UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 93-3-P-C***
	)	***(Civil No. 95-204-P-C)***
DARYL E. SINGLETERRY,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Daryl E. Singleterry moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Singleterry was convicted of possession with intent to distribute and aiding and abetting possession with intent to distribute cocaine under 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(iii) and 18 U.S.C. § 2, use and carrying of a firearm in connection with a drug trafficking offense under 18 U.S.C. § 924(c), and deriving certain personal property from proceeds obtained as the result of drug trafficking activity under 21 U.S.C. § 853. He asserts four grounds for relief, one claiming denial of his right to a jury trial, and three claiming denial of due process of law. Because Singleterry's claims are not properly raised on this section 2255 motion, I recommend that the motion be denied without a hearing.

I. Background

On January 15, 1983 Maine law enforcement agents executed warrants to search Room 225 of the Days Inn in Kittery, Maine and a car owned by Jamee Landry, an associate of Singleterry. *United States v. Singleterry,* 29 F.3d 733, 735 (1st Cir.), *cert. denied,* 130 L. Ed. 2d 552 (1994).

Finding Singleterry and Landry in the hotel room, they seized $2,061 in cash and two savings account passbooks with a combined balance of $5,100. *Id.* In Landry's car they found 6.46 grams of crack cocaine and a fully-loaded semi-automatic handgun. *Id.* They then arrested Singleterry and read him his *Miranda* rights, whereupon Singleterry voluntarily admitted that the cash and the savings account balances were proceeds from his sale of cocaine base. *Id.*

Singleterry was charged in a three-count indictment with possession with intent to distribute and aiding and abetting possession with intent to distribute cocaine, the use and carrying of a firearm in connection with a drug trafficking offense, and deriving certain personal property from proceeds obtained as the result of drug trafficking activity. *Id.* The parties stipulated that the court, rather than the jury, would decide the criminal forfeiture count (Count III). Transcript of Proceedings, *United States v. Singleterry*, Crim. No. 93-3-P-C ("Trans.") at 33. In its preliminary instructions, the court noted three times that the government bears the burden of proof, *id.* at 5-6, and that "the defendant has no burden of proof whatever at any time during the course of these proceedings and the defendant need not produce any evidence," *id.* at 7. The transcript also reflects the following statement:

> The cardinal principle for you to remember throughout this trial is that this defendant is clothe [sic] with a presumption of innocence. Under the constitution of the United States he sits here in this trial presumed to be not guilty. And he is not in fact guilty until in the course of your deliberations you are satisfied, if you are so satisfied, that the *defendant* has proven the elements of each charge made against him by proof beyond a reasonable doubt.

Id. at 9 (emphasis added). Neither counsel objected to the preliminary instructions. *Id.* at 13.

During the trial the prosecutor questioned one of the arresting officers about the contents of a plastic baggy:

Q. Inside the plastizene [sic] baggy is white powder; do you recognize that?

A. Yes.

Q. Is that the item you referred to as what appeared to be crack cocaine from a vehicle marked Jamee on the early morning of January 15?

A. Yes.

Id. at 41-42. The baggy and its contents were later admitted into evidence. *Id.* at 116.

In its final instructions the court stated at least six times that the government bears the burden of proof, *id.* at 172, 178, 189, 194, 203, and confirmed that the defendant has no burden of proof, *id.* at 172. After deliberating for forty-four minutes, the jury returned guilty verdicts on Counts I and II. *Id.* at 209-10. The court entered judgment against Singleterry on Count III. *Id.* at 215.

At the sentencing hearing, Singleterry's counsel objected to the government's calculation of the amount of cocaine used to determine his sentence. *Id.* at 222. The prosecutor responded:

> With respect to . . . the determination of the drug quantity involved in the offense conduct, there really are two numbers, one is the actual quantity of cocaine base or crack that is seized in connection with this case, that is not in dispute.
>
> In addition, the U.S. Probation office has properly recommended to the Court that the currency, that the money represented by the currency and the bank accounts be converted into an appropriate drug quantity.
>
> THE COURT: And that is done by basing it upon the available evidence as to what he was selling, the rate at which he was previously selling drugs, a certain designated quantity.
>
> [PROSECUTOR]: That's correct. . . .
>
> Here the U.S. Probation office has . . . adopted what he told the police in his confession as the price. Therefore, it would appear to be beyond contravention here today.

Id. at 223-24. Relying in part on the presentence investigation report, the court found that the case involved a total of 73.66 grams of cocaine base. *Id.* at 229-30. Accordingly, the court found that United States Sentencing Commission Guideline § 2D1.1(c)(6) (Nov. 1, 1992) required a Base

Offense Level of 32 on Count I. Memorandum of Sentencing Judgment (Docket No. 46) at 1.

II. Grounds for Relief

Singleterry first claims that he was denied his right to a jury trial because counsel stipulated, without his consent, to have the court decide the forfeiture charge. Section 2255 applies to federal prisoners "claiming the right to be released." 28 U.S.C. § 2255. Vacating the forfeiture judgment, however, would not affect Singleterry's custodial status. *See United States v. Michaud*, 901 F.2d 5, 7 (1st Cir. 1990) (monetary fine does not satisfy § 2255 "in custody" requirement). Accordingly, Singleterry may not attack the forfeiture judgment in this section 2255 motion. *United States v. Segler*, 37 F.3d 1131, 1137 (5th Cir. 1994) (§ 2255 requires not only that movant be in custody, but also that claims relate to unlawful custody).

Singleterry's remaining arguments assert that he was denied due process of law by: (1) improper shifting of the burden of proof to the defendant during preliminary instructions; (2) introduction of cocaine powder into a case charging possession with intent to distribute cocaine base;[1] and (3) improper calculation of his sentence based on inaccurate information in the presentence investigation report. He did not raise these claims on direct appeal. *Singleterry*, 29 F.3d at 734-35.

Constitutional claims (except ineffective-assistance-of-counsel claims) not raised on direct appeal are barred on collateral attack unless the defendant can show cause for the failure to raise

[1] Singleterry claims that, by introducing cocaine powder into evidence, the prosecution constructively amended the indictment, which charged possession with intent to distribute cocaine base. *See Stirone v. United States*, 361 U.S. 212, 217 (1960) (court may not permit defendant to be tried on charges not made in the indictment).

them and actual prejudice. *Knight v. United States*, 37 F.3d 769, 774 (1st Cir. 1994). Non-constitutional, non-jurisdictional claims not raised on direct appeal are barred on collateral attack unless "the claimed error is 'a fundamental defect which inherently results in a complete miscarriage of justice' or 'an omission inconsistent with the rudimentary demands of fair procedure.'" *Id.* at 772 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). Assuming, *arguendo*, that Singleterry's arguments are constitutionally cognizable and therefore subject to the more lenient "cause and prejudice" test, his claims are nonetheless barred.

A. Burden of Proof

Singleterry does not allege cause for his failure to raise the burden of proof claim on direct appeal. Mindful of Singleterry's pro se status, I nevertheless discern no such cause from the record.

Even if cause were shown, the court's inadvertent substitution of "defendant" for "government" could not have prejudiced the defendant. First, a rational jury could not possibly believe that the defendant must prove each element of the charges against himself, and therefore would understand, assuming they picked up the erroneous reference, that the court intended to refer to the government. In any event, the court cured this alleged error by noting on numerous occasions in its subsequent final instructions that the government bore the burden of proof.

B. Introduction of Cocaine Powder

Singleterry does not allege, nor can I discern, any cause for his failure to argue on direct appeal that the prosecution improperly introduced cocaine powder. He argued before the First Circuit that his sentence was a product of the unconstitutional distinction between cocaine base and

cocaine powder offenses. *Singleterry*, 29 F.3d at 739. Given that context, I find no justification for his failure to argue on direct appeal that the drug introduced at trial was cocaine powder.

Nor is there any suggestion of prejudice resulting from the alleged misconduct. Even if the evidence introduced was cocaine powder,[2] it was introduced at trial as cocaine base,[3] and he was convicted and sentenced for possession with intent to distribute cocaine base. His argument that the introduction of cocaine powder constructively amended the indictment is without merit.

C. Presentence Investigation Report

Singleterry does not allege cause for his failure to challenge on direct appeal the amount of cocaine base involved in his offense.[4] Again, his direct appeal involved the sentencing distinction between cocaine powder and cocaine base. Given that context, I find no justification for his failure raise this claim on direct appeal.

III. Conclusion

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[2] *But see* Exh. A to Government's Response to the Petition to Vacate, Set Aside or Correct Sentence Filed Pursuant to 28 U.S.C. § 2255 (Docket No. 57) (laboratory analysis identified substance as "6.46 grams white powder -- contains cocaine (free base)").

[3] Although the prosecutor once referred to it as "white powder," immediately thereafter he described it as "the item [the witness] referred to as what appeared to be crack cocaine." Trans. at 41-42. When it was admitted, the prosecutor read to the jury the stipulation that "Government Exhibit 2 contains what is in fact 6.46 grams of cocaine base." *Id.* at 116-17.

[4] On the prejudice issue, Singleterry argues that the court adopted the presentence investigation report's finding that Count I involved 73.66 grams of cocaine base based on his admission that the cash and savings account balances were proceeds of his cocaine sale. Yet, he argues, he did not specify how much, if any, of the cocaine he sold was cocaine base. I need not decide whether the alleged miscalculation prejudiced Singleterry because he fails to demonstrate cause. I note, however, that the First Circuit characterized his admission as pertaining to cocaine base. *Singleterry*, 29 F.3d at 735.

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be ***DENIED*** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 26th day of January, 1996.

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David M. Cohen
United States Magistrate Judge